TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1904.

No. 92. 93.

M. H. COURTNEY, APPELLANT,

vs.

LOUIS A. PRADT, EXECUTOR OF MERRIT S. ATWATER, DECEASED, AND WILLIAM C. ATWATER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED JULY 27, 1903.

(19,022.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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M. H. COURTNEY, APPELLANT,

vs.

LOUIS A. PRADT, EXECUTOR OF MERRIT B. ATWATER, DECEASED, AND WILLIAM C. ATWATER.

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1 Proceedings in the circuit court of the United States for the sixth judicial circuit and eastern district of Kentucky, at a regular term begun and held at the Federal court hall in the city of Covington, April 6th, A. D. 1903.

Court met
Present: Honorable A. M. J. Cochran, judge.

M. H. COURTNEY
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, & Wm. C. Atwater. } # 2316.

Be it remembered that heretofore, to-wit, on Tuesday April 8th A. D. 1902, an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 419.

This day came the defendants, by R. D. Hill, their attorney and, in open court, filed a transcript of the proceedings had herein in the Powell circuit court, and, on his motion, said case is placed upon the equity side of the docket of this court.

And on the same day, to-wit, on April 8th A. D. 1902, the transcript from the Powell circuit court, mentioned in the foregoing entry was filed herein which was and is in words and figures following, to-wit:—

2 Powell Circuit Court.

M. H. COURTNEY
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, and William C. Atwater. } Petition in Equity.

The plaintiff, M. H. Courtney, states that during the year 1890 and prior thereto, Meritt B. Atwater and defendant, William C. Atwater, were partners trading and doing business under the firm name of M. B. Atwater & Company. That prior to the 10th day of December, 1890, this plaintiff at the special instance and request of said firm of M. B. Atwater & Company rendered to said firm divers valuable services.

Plaintiff states that on the 10th day of December, 1890, said firm of M. B. Atwater & Company was indebted to the plaintiff in a large sum of money for said services rendered by plaintiff and that there was an honest difference in the amount claimed by this plaintiff to

be due him from said firm and the amount claimed by said firm to be due from them to plaintiff, plaintiff claiming more than defendants were willing to admit.

Plaintiff states that in order to settle their said differences and to compromise and adjust said amount satisfactorily to said firm and to plaintiff, the said Merritt B. Atwater and William C. Atwater, partners as aforesaid, made a proposition in writing to this plaintiff, by a letter of that date in which they proposed to give plaintiff in satisfaction of the indebtedness of said firm to him, capital stock in the Atwater & Fair Lumber Company, a corporation created in Wisconsin, of the par face value of five thousand ($5,000.00) dollars with a guarantee that it was worth eight thousand dollars ($8,000.00) and that said firm would take said stock, at the end of that season's cut, and pay plaintiff therefor the sum of eight thousand dollars ($8,000.00) in cash.

3 Plaintiff states that he accepted said proposition by letter which he wrote shortly after receiving same, which was on or about the 12th day of December, 1890. Plaintiff states that the letter containing said proposition for said firm of M. B. Atwater and Company was received by him in Clay City, Kentucky, and that his said letter of acceptance was mailed by him in Clay City, Kentucky, to said firm, and was duly received by them, and, that plaintiff, at the time of receiving and accepting said proposition was a citizen and resident of the State of Kentucky, and plaintiff is now a citizen and resident of said State of Kentucky.

Plaintiff states that, at the end of said season's cut he demanded of said firm that they should comply with their said proposition and pay him said eight thousand dollars, but plaintiff states that said firm wholly failed to carry out their agreement and wholly failed to transfer or give to him said stock in said Atwater and Fair Lumber Company, and wholly failed to pay him said eight thousand dollars, or any part thereof.

Plaintiff states that said letter containing said proposition to him will be filed as part hereof, if required, but the letter which he wrote, accepting said proposition, and which was received by said M. B. Atwater and Company cannot be filed herewith, because it is not in plaintiff's possession.

Plaintiff states that, at various times after said contract was made the said Merritt B. Atwater and William C. Atwater ratified same and promised this plaintiff to carry out its provision and to pay plaintiff said eight thousand dollars, as agreed therein, but plaintiff says that no part thereof has ever been paid.

Plaintiff states that on, to-wit the — day of —— 1898, the said Merritt B. Atwater departed this life having made and executed his last will and testament by which he appointed the defendant, Louis A. Pradt, his executor; that said will was duly probated by the county court of Marathon county, in the State of Wisconsin,

4 and that said Louis A. Pradt duly qualified there as executor of said Merritt B. Atwater, deceased, and is now acting as such executor.

Plaintiff states further that the Atwater and Allen Land & Lumber Company is a corporation duly created by and organized under the laws of the State of Wisconsin, with power to buy, sell, own and hold real estate in the State of Kentucky, and, that prior to August, 1901, said corporation did buy and own real estate in the State of Kentucky and, practically all of its assets consisted of real estate in the said State of Kentucky. Plaintiff states that during the month of August, 1901, said corporation sold its said real estate and realized a large sum of money therefor, and that practically the only business ever done by said corporation was to buy, own, hold and sell said real estate in the State of Kentucky.

Plaintiff states that Merritt B. Atwater, at the time of his death, owned stock in said corporation and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merritt B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell county, Kentucky, and, that said corporation has an agent resident there, upon whom a summons can be served.

Plaintiff states that said defendant, Louis A. Pradt, executor of said Merritt B. Atwater, deceased, is a non-resident of this State, and believed to be absent therefrom. That he resides and may be found in the city of Washington, District of Columbia, and that said city of Washington, District of Columbia is the name of the place wherein a post-office is kept nearest to the place where said defendant resides and may be found.

Plaintiff further states that the nature of his claim herein is for a debt demand arising upon an express contract—that it is just and plaintiff believes that he ought to recover from the defendants the sum of eight thousand dollars with interest thereon at the rate of six per cent. per annum from the 1st day of November 1891, until paid; said date being after the end of said season's cut and after plaintiff had made the aforesaid demand.

5 Plaintiff files herewith, as part hereof, his separate affidavit verifying said claim, as required under section 2870 of the Kentucky Statutes.

Plaintiff knows of, and states, that there are no other creditors in the State of Kentucky of the said Merritt B. Atwater, deceased, and plaintiff states that there are assets in the hands of Louis A. Pradt, executor of Merritt B. Atwater, deceased, and assets of the estate of Merritt B. Atwater, deceased, in the State of Wisconsin, exclusive of the stock held by him in said corporation and exclusive of indebtedness of said corporation to said executor, more than sufficient in value to pay all the debts of said estate, owing to creditors of said Merritt B. Atwater, outside of the State of Kentucky.

Plaintiff states that the said Merritt B. Atwater, by his will, after devising to his daughter, Charlotte R. Pradt, his residence in the city of Wausau, Wisconsin, and to Sarah Downs—one thousand dollars ($1,000.00) and to defendant, William C. Atwater, all of his right, title and interest in and to the Seamless Structural Company of Mil-

waukee, Wisconsin—bequeathed and devised the rest and residue of his estate, real, personal and mixed, to his wife, Charlotte Atwater for and during the period of her natural life, and, after her death, he bequeathed and devised to the defendant, William C. Atwater, an undivided one-sixth interest in said rest and residue of his said estate.

Plaintiff states that the said capital stock, held by the said Merritt B. Atwater in the Atwater and Allen Land and Lumber Company constitutes a part of said rest and residue of his said estate, and, that the defendant, William C. Atwater, has an equitable interest therein.

Plaintiff states that the said Charlotte Atwater departed this life on to-wit the — day of —— 1899.

6 Plaintiff states that the said defendant, William C. Atwater, is a non resident of this State and believed to be absent therefrom; that he resides and may be found in the city of Chicago, State of Illinois and that said city of Chicago, State of Illinois, is the name of a place wherein a post office is kept nearest to the place where said defendant resides and may be found.

Plaintiff states that said William C. Atwater is insolvent; that the said will of Merritt B. Atwater has not been probated in Kentucky and, that it would be unjust and inequitable to this plaintiff to permit said executor to collect, or withdraw, any of said assets arising from the said real estate in Kentucky and distribute them under said will in a foreign jurisdiction until after plaintiff's claim against the estate of Merritt B. Atwater, deceased, and against said William C. Atwater, is paid in full and that unless an attachment is granted plaintiff herein and said assets attached and subjected by the court to plaintiff's claim herein they will be collected by said executor and withdrawn from the jurisdiction (of this State and distributed in a foreign jurisdiction) and plaintiff will be without remedy.

Wherefore, plaintiff prays for judgment against the defendant, Louis A. Pradt, executor of Merritt B. Atwater deceased, and William C. Atwater, and each of them, for the sum of eight thousand dollars, with interest thereon at the rate of 6 *% cent.* per annum from the 1st day of November, 1891, until paid and for his costs herein and prays for a general attachment against the property of said defendants, including debts owing to them, or either of them, and any choses in action, stocks, legal or equitable interests they may have in stock or other property and that the same, when attached may be subjected and applied to the satisfaction of plaintiff's claim herein, and further prays for all (general,) equitable and proper relief.

W. B. DIXON,
Att'y for Plaintiff.

7 M. H. Courtney says the statements contained in the foregoing petition are true.

M. H. COURTNEY.

Subscribed and sworn to before me by M. H. Courtney this 25th day of September, 1901.

A. H. NORTON,
Clerk Powell Circuit Court.

The affiant, M. H. Courtney, states that prior to the 10th day of December, 1890, at the special instance and request of M. B. Atwater and William C. Atwater, partners composing the firm of M. B. Atwater and Company, he rendered divers services to said firm and that said firm being indebted to him did, by letter, dated the 10th day of December 1890 propose to him in writing to give him in satisfaction of the said indebtedness of said firm to him, capital stock in the Atwater and Fair Lumber Company, a corporation created in Wisconsin, of the par face value of five thousand dollars, with a guarantee that it was worth eight thousand dollars, and that said firm would take said stock at the end of that season's cut and pay affiant therefor the sum of eight thousand dollars in cash.

Affiant states that he wrote a letter to said firm on or about the 12th day of December, 1890, which letter was duly received by said firm and, in which he accepted said proposition.

Affiant says that, at the end of said season's cut, he demanded of said firm that they should comply with their said proposition and pay him said eight thousand dollars—but affiant says that said firm wholly failed to carry out their said agreement and wholly failed to transfer, or give him, said stock, in said Atwater & Fair Lumber Company and wholly failed to pay him said eight thousand dollars, or any part thereof, and that no part thereof has ever
8 been paid and that the estate of said M. B. Atwater is indebted to him in said sum of eight thousand dollars with interest thereon at the rate of six per cent. per annum from the first day of November, 1891, until paid. That his said demand is just and has never, to his knowledge or belief, been paid and that there is no off-set nor discount against the same or any usury therein.

M. H. COURTNEY.

Subscribed and sworn to before me by M. H. Courtney this 25th day of September, 1901.

A. H. NORTON, *Clerk.*

The defendant, Louis A. Pradt, executor of Merritt B. Atwater and the defendant, William C. Atwater, are hereby warned to appear in the Powell circuit court at the March term, 1902, and defend the above styled action and M. A. Phillips, a regular practicing attorney of this bar, is appointed corresponding attorney for the non-residents herein and, being present, accepted said appointment.

Given under my hand as the clerk of the Powell circuit court this September the 25th, 1901.

A. H. NORTON, *Clerk.*

Attachment Bond.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Defendant. } Attachment Bond.

We undertake that the plaintiff, M. H. Courtney, shall pay to the defendant, Louis A. Pradt, executor of M. B. Atwater, and William C. Atwater, the damage not exceeding twenty-five thou-
9 sand six dollars which they may sustain by reason of the attachment in this action—if the order thereof is wrongfully obtained.

Witness our hands, this 25th day of September, 1901.

M. H. COURTNEY.
A. W. SPOTSWOOD.

Taken and subscribed in presence of
A. H. NORTON, *Clerk.*

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, and William C. Atwater, Defendants. } Order of Attachment.

The Commonwealth of Kentucky to the sheriff of Powell county:

You are commanded to attach and safely keep the property of the defendants, Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater, in your county not exempt from execution or so much thereof as will satisfy the claim of the plaintiff in this action for twelve thousand eight hundred dollars ($12,800.00) and $100.00 for the cost of the action and to summons the Atwater and Allen Land and Lumber Company—the garnishee—to answer herein on the 1st day of the next March
10 term of the Powell circuit court, and make due return on this order on that day.

Witness, A. H. Norton, clerk of said court, this 25th day of September, 1901.

A. H. NORTON,
Clerk P. C. C.

To the Atwater & Allen Land and Lumber Company:

The object of this action is to attach any money owing by you to the defendants or either of them and to prevent you from paying to them, or either of them, or to any one for them, and to compel

you to answer as garnishee herein and hold said money subject to the order of the court—and further to attach the capital stock in said Atwater & Allen Land and Lumber Company belonging to defendants, or either of them and any legal or equitable interest of the defendants therein.

W. B. DIXON,
Att'y for Plaintiff.

Came to hand September 25th, 1901 at 6.30 p. m.
T. B. WARE, *S. P. C.*,
By J. M. WELCH, *D. S.*

Executed the within attachment on the Atwater and Allen Land and Lumber Company by delivering to Edward Rhubusky, the duly appointed agent of said Atwater & Allen Land and Lumber Company a copy of the within attachment, and summoning said Atwater — Allen Land and Lumber Company to answer as garnishee this September 25th, 1901.

T. B. WARE, *S. P. C.*
J. M. WELCH, *D. S.*

11 Powell Circuit Court, March Term, 19" Day of March, 1902.

M. H. COURTNEY, Plaintiff,
v.
L. A. PRADT, &c., Defendants.
} Answer of Garnishee Atwater.

(Filed March 19th, 1902. A. H. Norton, Clerk.)

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
L. A. PRADT, Executor of Merrirr B. Atwater & Wm. M. Atwater, Dec'd, Defendants.
} Answer of Garnishee Atwater & Allen Land & Lumber Company.

The Atwater and Allen Land and Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, summoned herein as garnishee, says that said M. B. Atwater in his life time owned two hundred and fifty shares of the capital stock of said company of the par value of $45.00 per share, and owned said two hundred and fifty shares at the time of his death and that said shares now stand on the book of said company in the name of said M. B. Atwater and now held by L. A. Pradt who is the executor of the estate of the said M. B. Atwater.

That, on the 30th day of August, A. D. 1901 a dividend was declared by the directors of said company at a meeting held on that date.

12 That the indebtedness to said Pradt, as executor of said M. B. Atwater, deceased, on account of said dividend is $4,757.37 and that said amount is being held by the Atwater

& Allen Land and Lumber Company, awaiting the decision of this court.

Said Atwater & Allen Land and Lumber Company does not owe anything to said W. C. Atwater who is now a stockholder in said company.

That said W. C. Atwater has not been a stockholder in said company since the year 1893 and was not a stockholder at the time of the declaration of said division on the 30th day of August A. D. 1901.

ATWATER & ALLEN LAND & LUMBER COMPANY,
[SEAL.] By WASHINGTON BECKER, *President.*

Washington Becker says that he is president of the Atwater and Allen Land and Lumber Company and that statements in the foregoing answer are true.

WASHINGTON BECKER. [SEAL.]

STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Subscribed and sworn before me this 17th day March 1902.
E. H. WILLIAMS,
Milwaukee County, Wisconsin.

My commission expires August the 17th, 1902.

13 STATE OF KENTUCKY:

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, and William C. Atwater, Defendants.

Petition for Removal to the Circuit Court of the United States for the Eastern District of Kentucky.

Your petitioners Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater respectfully show to this honorable court that they are the defendants in this suit, which is of a civil nature and that the matter and amount in dispute in this cause exceeds the sum or value of two thousand dollars ($2,000.00) exclusive of interest and costs and that the controversy herein is wholly between citizens of different States; that the plaintiff, M. H. Courtney, was, at the time of the commencement of this suit, and still is, a citizen of the State of Kentucky—residing at Clay City, in said State and that your petitioner, Louis A. Pradt, executor of Merritt B. Atwater, deceased, was, at the time of the commencement of this suit,

and still is, a citizen of the State of Wisconsin and of no other State—residing in the city of Wasau, in said State, and your petitioner, William C. Atwater was, at the time of the commencement of this suit, and still is a citizen of the State of Illinois and of no other State—residing in the city of Chicago, in said State, and that your

14 petitioners desire to remove this cause before the trial thereof, into the next circuit court of the United States to be held in the eastern district of Kentucky, and your petitioners offer herewith good and sufficient surety for their entering in the circuit court of the United States for the eastern district of Kentucky, first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners therefore pray that the said surety and bond may — accepted. That this suit may be removed to the next circuit court of the United States to be held in the eastern district of Kentucky, pursuant to the statutes of the United States in such cases made and provided and that no further proceedings may be had herein in this court—and they will ever pray.

WM. C. ATWATER,
LOUIS A. PRADT,
Petitioners.

R. D. HILL,
Attorney for Petitioners.

CITY OF WASHINGTON, *District of Columbia,* } ss:

Louis A. Pradt, executor of Merritt B. Atwater, deceased, makes oath and says that he is the petitioner above mentioned; that the statements of the foregoing petition are true to his own knowledge.

LOUIS A. PRADT.

Subscribed and sworn to before me this 3rd day of March, 1902.

E. C. BRANDENBURG,
Notary Public, D. C.

15 R. D. Hill says he is attorney for the foregoing named Louis A. Pradt, executor of Merritt B. Atwater and William C. Atwater both of whom are absent from Kentucky; that the statements of the foregoing petition are true as he believes.

R. D. HILL.

Sworn to before me by R. D. Hill March 21st, 1902.

A. H. NORTON, *Clerk.*

STATE OF KENTUCKY:

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Dec'd, and William C. Atwater, Defendants. } Bond on Removal.

Know all men by these presents, that we, Louis A. Pradt, executor of Merritt B. Atwater, deceased, of the city of Wasau, Wisconsin, and William C. Atwater of Chicago, Illinois, as principal and R. D. Hill, of the city of Louisville and State of Kentucky, as surety, are holden and stand firmly bound unto M. H. Courtney in the penal sum of one thousand dollars ($1,000.00) for the payment whereof well and truly to be made unto the said M. H. Courtney, his heirs, representatives and assigns, we bind ourselves, our heirs and
16 assigns jointly and firmly by these presents. Upon condition nevertheless that whereas the said Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater have filed their petition in the Powell circuit court for the removal of a certain cause therein pending wherein the said M. H. Courtney is plaintiff and the said Louis A. Pradt executor of Merritt B. Atwater, deceased, and William C. Atwater are defendants to the circuit court of the United States for the eastern district of Kentucky.

Now, if the said Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater shall enter in the circuit court of the United States for the eastern district of Kentucky on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or impropery removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we, the said Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater and R. D. Hill have hereunto set our hands and seals this 21st day of March, 1902.

LOUIS A. PRADT,
Executor of Merritt B. Atwater. [SEAL.]
WILLIAM C. ATWATER, [SEAL.]
By R. D. HILL, *Attorney.*
R. D. HILL. [SEAL.]

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

R. D. Hill makes oath that he resides in the city of Louis-
17 ville, county of Jefferson and State of Kentucky; that he is a free holder in said State and is worth the sum of $5000.00 over and above all property exempt from sale on above execution.

R. D. HILL.

Subscribed and sworn to before me this 21st day of March 1902.
A. H. NORTON, *Clerk.*

STATE OF KENTUCKY:

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, } Order.
Defendants.

The defendants herein, Louis A. Pradt, executor of Merritt B. Atwater, deceased, and Wm. C. Atwater, this day filed their petition for removal of this cause to the circuit court of the United States for the eastern district of Kentucky, and having at the same time offered their bond in the sum of $1000.00 with R. D. Hill—good and sufficient surety, pursuant to statute and conditioned according to law.

Now, therefore, this court does hereby accept and approve said bond and accept said petition and does order that this cause be removed for trial to the next circuit court of the United States for the eastern district of Kentucky, pursuant to the statutes of the
18 United States and that all other proceedings of this court be stayed.

STATE OF KENTUCKY, } *sct:*
County of Powell, }

I, A. H. Norton, clerk of the Powell circuit court do hereby certify that the above is a true and complete copy of the pleadings and exhibits and order of transfer and bond in the above styled action as appears of record in my office.

Given under my hand as clerk of said court this April 3rd, 1902.
A. H. NORTON,
Clerk Powell Circuit Court.

And, on a day following, to-wit, on April 21" A. D. 1902 answer of corresponding attorney was filed herein which was and is in words and figures following, to-wit:—

The Circuit Court of the United States for the Eastern District of Kentucky.

M. H. COURTNEY
v.
LOUIS A. PRADT, &c. } Answer of Corresponding Attorney.

For answer herein say that on the 25th day of September 1901. your undersigned was appointed by the clerk of the Powell cir-

cuit court, upon the filing of the suit herein corresponding
19 attorney for the non-residents, Louis A. Pradt and William C. Atwater that, after said appointment said petition was copied and together with a letter notifying said non-residents of the suit filed, and asking what defense, if any, they had to said action, and no defense being communicated from would ask that all be admitted to their interest, and everything be denied to their prejudice, and that their interest be protected throughout this litigation, and that the undersigned be allowed by this court a reasonable fee for his services rendered herein not to exceed one hundred dollars.

M. A. PHILLIPS,
Corresponding Att'y.

And on a day following, to-wit: on September 9" A. D. 1902 notice of motion to dismiss was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

M. COURTNEY
v.
L. A. PRADT ET AL.

William B. Dixon, Esq., counsel for above-named plaintiff, is hereby notified that on Tuesday, the ninth day of September, 1902, defendants, Louis A. Pradt, executor of Merritt B. Atwater, and William C. Atwater will, at Covington, Kentucky, before said court, appearing for that purpose only, file a written motion in the above styled case, that said case be then and there dismissed for want of jurisdiction in said court to try same; and said defendants will also, at said time and place, file their demurrer to the jurisdiction
20 of the court, and ask that said motion be submitted and at once heard.

R. D. HILL,
Counsel for Defendants.

Service of above notice accepted this September 20", 1902
W. B. DIXON,
Att'y for Pl'ff.

And on the same day, to-wit: on September 9" A. D. 1902 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 530.

This day came the plaintiff, by W. B. Dixon, and moved to remand this cause to the State court whence it was removed.

The court, not being advised, takes time and said motion is submitted. Came the defendants, by R. D. Hill, their attorney, and

filed special demurrer and motion to dismiss bill for want of jurisdiction. The court, not being advised, takes time and said motions are submitted. Counsel on both sides are given thirty days in which to file briefs.

And on the same day, to-wit: September 9" A. D. 1902 motion to remand was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court, Sixth Circuit & Eastern District of Kentucky.

M. H. COURTNEY
v.
LOUIS A. PRADT, Ex'r. } Motion.

21 The plaintiff, M. H. Courtney, moves the court to remand this case to the State court from whence it was removed.

BRECKINRIDGE & SHELBY &
W. B. DIXON, *Att'ys for Pl'ff.*

And, on the same day, to-wit: on September 9" A. D. 1902 motion was filed herein which was and is in words and figures following, to-wit:—

In the United States Circuit Court, Eastern District of Kentucky.

M. COURTNEY, Plaintiff,
v.
L. A. PRADT ET AL., Defendants. } Motion.

The defendant, L. A. Pradt, executor of Merritt B. Atwater and William C. Atwater, entering their appearance herein for the purpose of this motion only, move the court to dismiss this cause for the want of jurisdiction to try same.

——— ———,
Attorneys for Defendants.

And, on the same day, to-wit: on September 9" A. D. 1902 special demurrer was filed herein which was and is in words and figures following, to-wit:—

22 In United States Circuit Court, District of Kentucky.

M. H. COURTNEY, Plaintiff,
v.
L. A. PRADT ET AL., Defendants. } Special Demurrer.

The demurrer of L. A. Pradt, executor of the estate of Merritt B. Atwater, deceased, one of the above named defendants to the bill of complaint in this action, is as follows:

This defendant, by protestation not confessing any or all of the matters or things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth;

First. That the court has no jurisdiction of the person of this defendant.

Second. That the court has no jurisdiction of the subject matter of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Fourth. That it appears upon the face of the said bill of complaint that this action was not commenced within the time limited by law; to-wit; within the time limited by —.

Fifth. That the plaintiff is not entitled upon said bill to the relief he prays for because he has a plain and adequate remedy at law.

Sixth. That the plaintiff hath not in and for his said bill stated such a case as entitled him in a court of equity to any discovery from this defendant or to any relief against him as to the
23 matters contained in the said bill of complaint or any of such matters, and that said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

R. D. HILL,
Counsel for the Defendant L. A. Pradt.

I hereby certify that I am a solicitor and of counsel for the defendant, L. A. Pradt, in the above entitled cause, and, that in my opinion the foregoing demurrer of L. A. Pradt, executor of the estate of William B. Atwater, deceased, defendant to the bill of complaint of M. H. Courtney, complainant, is well founded in point of law and proper to be filed in the above cause.

R. D. HILL,
Solicitor & of Counsel for Defendant L. A. Pradt.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

R. D. Hill, being duly sworn, deposes and says, that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

R. D. HILL.

Subscribed and sworn to before me this 9th day of September, A. D. 1902.

JOS. C. FINNELL,
Clerk U. S. Courts.

24 And on a day following, to-wit on January 19" A. D. 1903 an opinion was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

M. H. COURTNEY, Plaintiff,
—.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Dec'd, & William C. Atwater, Defendants. } Opinion.

This is a suit by a creditor of a partnership, one of whose two members is dead, against his executor and the surviving partner seeking to obtain payment of his debt. Both of defendants are non-residents of this State and were so when the suit was brought. The decedent was likewise a non-resident at the time of his death and the defendant executor was appointed and qualified as such in the State of decedent's domicile, to-wit: the State of Wisconsin. The suit was brought originally in the Powell circuit court and has been removed to this court by the defendants on the ground of diversity of citizenship. Each defendant was brought before the State court by constructive service of process and neither entered his appearance to the suit. An attachment was sued out and levied on stock owned by the decedent in a Wisconsin corporation, doing business in this State, and an indebtedness on the part of said corporation to him by serving the writ of attachment upon its agent in this State designated in accordance with the requirement of sec. 571 Ky. Stat. It was not levied upon any property of the surviving
25 partner the other defendant. It is therefore, a suit to subject the stock in and claim against said foreign corporation to the payment of said indebtedness by means of this attachment.

The defendants move to dismiss the suit because its predecessor, the State court, acquired no jurisdiction by virtue of the proceedings had therein of the subject matter of the suit or the persons of defendants.

It is certain that the State court had no jurisdiction so far as William C. Atwater, the surviving partner was concerned unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that William C. Atwater has any property in this State and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone.

It is claimed by defendants that the State court acquired no jurisdiction of the suit so far as said defendant was concerned upon two grounds. One is that by reason of the fact that the garnishee is a foreign corporation, the decedent's stock in and claim against it is not subject to attachment and subjection to payment of plaintiff's

indebtedness against the partnership in the courts of the State. The case of

N. J. Sheep & Wool Co. *v.* Traders Deposit Bank 104 Ky. 90

seems to support the defendant's position as to the stock and the case of

Pittsburg C. C. & St. L. R'y Co. *v.* Bartels 21 Ky. L. R. 1670

seems to be against their position as to decedent's claim against the foreign corporation. The case is attempted to be distinguished from this case on the ground that the foreign corporation there had property in this State and had been served with the writ of attachment in accordance with section 203 of the Civil Code, whereas the
26 foreign corporation here has no property in this State and was served with the writ of attachment in accordance with sec. 571 Ky. Statute-. To say the least, I doubt whether either or both of these considerations are sufficient to differentiate that case from this and there is room for claiming, irrespective of that case, that if the State court has jurisdiction of a suit against a foreign corporation on behalf of decedent or his estate it also has jurisdiction of a suit on behalf of a creditor of decedent seeking to subject decedent's claim against the corporation to payment of his debt, or in other words, that the fact that the foreign corporation is liable to be sued in this State was sufficient to give its indebtedness a situs in this State for purpose of garnishment in the courts thereof.

I do not find it necessary to commit myself further as to this ground upon which it is claimed by defendants the State court had no jurisdiction of this suit.

The other ground is that because the claim garnisheed is a decedent's estate it was not subject to attachment. I confess that at first I was clearly of the opinion that the position was well taken. The argument of counsel for plaintiff, however, has a tendency to bring me to the conclusion that it is not. It is that the statutory provisions requiring a rateable distribution of a decedent's estate amongst his creditors do not have the effect of prohibiting a creditor from suing and obtaining an attachment before judgment and execution after judgment by which he will secure a preference. The only way in which such preference can be prevented is by suit in equity to settle the estate and an injunction against the institution or prosecution of such a suit. As to the correctness of the contention of plaintiff's counsel in this particular I do not find it necessary to commit myself. Likewise as to his contention that with-
27 out an attachment plaintiff had a right upon constructive service alone to subject the foreign corporation's indebtedness to payment of plaintiff's claim. It would seem, however, that if this is so the foreign corporation should have been made a defendant. And, as bearing on the question see Judge Bullitt's note to sec. 418 of Civil Code.

The reason why I have not found it necessary to dispose of these contentions of counsel more definitely, is, that there is one ground upon which it can be claimed without question the State court had no

jurisdiction of the suit as against the defendant executor and hence not at all and that ground is that he is a foreign executor. The law in regard to the right of foreign representatives of decedent's estate to sue and be sued in other jurisdictions than those in which they were appointed is thus stated by Mr. Justice Story in

Vaughn *v.* Northrup 15 Pet. 1—

"It has become an established doctrine that an administrator appointed in one State cannot in his official capacity sue for any debts due to his intestate in the courts of another State and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debt due there by his intestate."

This law has been recognized and applied in this Commonwealth. Because of it, it has been held that a foreign personal representative could not sue to recover a debt due the decedent without complying with the terms of sec. 3878 & 3879 Ky. Stat.

Marrett *v.* Babb 91 Ky. 88

And that a foreign personal representative could not sue at all in this State to recover an asset of the estate which did not constitute a debt due the decedent

Maysville St. R. R. & T. Co. *v.* Marvin 59 Fed. 91
L. & N. R. R. Co. *v.* Brantley 96 Ky. 297

28 That a suit cannot be brought in this State against a foreign personal representative is expressly decided in the case of

Smith *v.* Baker 3 Met. 264

It is true that this suit is against him to subject an asset claimed to have a situs in this State. But that can make no difference. The resident creditors of a non-resident decedent have ample provision made for subjecting assets having a situs in the State to the payment of their debts. They can obtain administration on the decedent's estate in this State and then those assets. And the foreign personal representative cannot sue at all for some and for those for which he can sue he is required to give bond that will protect local creditors. It is, therefore, not necessary in order to protect them that such a novel proceeding as a suit against the foreign personal representative should be upheld. I am not aware of any authority justifying such a proceeding.

It seems to me, therefore, that the motion to dismiss the suit because of want of jurisdiction in the State court to entertain a suit should be sustained. There is no doubt that if such want of jurisdiction exists this court has the power to dismiss the suit. I am not bound to remand the case and let the State court determine the question. By reason of the diversity of citizenship and compliance with the removal statutes this court has acquired the right to determine that question and to act accordingly.

But, it is contended by counsel for plaintiff that the case was not removable within the principle applied in the case of

Cates *v.* Allen 149 U. S. 451

and should, therefore, be remanded. He has made motion to that effect upon this idea. But this case does not come within the case of Cates *v.* Allen. That was a suit in a State court of Mississippi brought by a creditor attaching an alleged fraudulent conveyance of his debtor. He had not obtained a judgment
29 and return of no property found. A statute of Mississippi authorized the suit without such preliminary action. A suit in equity cannot be brought without it. The case was removed to the Federal court. It was held by the Supreme Court that the case should be remanded because it was not a suit in equity within the removal statute and the State court under the statute had jurisdiction of it. If such a suit as that brought herein is maintainable it is a suit at law. The mere fact that an attachment is sued out in it does not make it a suit in equity. The early attachment statutes of Kentucky may have provided that the suit should be in equity. But the present attachment statutes do not so provide and they more frequently find application in actions at law than in suits in equity. And, even if it were a suit in equity the case of Cates against Allen is not an authority against the posision that the Federal court would have jurisdiction in equity in such a case. It would seem to come within the case of

Holland *v.* Challen 110 U. S. 15 and similar cases.

The motion to remand is therefore over-ruled.

As the position taken in regard to this being a suit against a foreign executor and hence not maintainable has not been considered by counsel for plaintiff in his brief he will have an opportunity to be heard in regard thereto if he so desires.

A. M. J. COCHRAN, *Judge.*

January 19", 1903.

30 And, on a day following, to-wit: on April 21" A. D. 1903 an opinion was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Ex'or, &c., Defendants. } 2nd Opinion.

Counsel for plaintiff have availed themselves of the leave granted them in the former opinion to be heard as to the position taken therein that this suit cannot be maintained because it is against a foreign executor and contend that that position is not well taken. In support of their contentions they cite the following decisions of the court of appeals of Kentucky to wit:—

Keiningham *v.* Keiningham, 71 S. W. 497
Davis *v.* Connelly, ex'r 4 B. M. 136

And the following decisions elsewhere, to-wit:—
Laughlin *v.* Solomon 180 Pa. St. 179.
Tunstall *v.* Pollard's Adm'r 11 Leigh. 1,
Mirey *v.* Mirey ex'or 32 Conn. 308
Brown *v.* Knapp 79 N. Y. 140
Lake *v.* Hardee 57 Ga. 467
Bank of Mobile *v.* McDonald 22 Ala. 476
Cady *v.* Bird 21 Kans. 667
Lewis *v.* Reed 11 Ind. 242
Mitchell's Lessee *v.* Eyster 7 Oh. 257

31 The cases of
Mitchell's Lessee *v.* Eyster, 7 Oh. 257
Cady *v.* Bird 21 Kans. 667
Bank of Mobile *v.* McDonald 22 Ala. 476

are not applicable here because in each instance there was a statute in the State where the case arose and was decided authorizing a suit against a foreign executor or administrator.

In the Kansas case the statute was in these words:—

"An executor or administrator duly appointed in any other State or county may sue or be sued in any court in this State in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may be sued."

In the Ohio case it was in these words:

"In case of a debtor residing out of the State the writ of attachment as above provided may issue against his heirs, executors or administrators."

In the Alabama case it was in these words:

"And in case of the death of any debtor residing out of the limits of this State, having lands or other property therein, the creditors resident within the State shall in like manner be entitled to recover by attachment against the executors and administrators."

The Ohio and Alabama statutes do not as plainly as the Kansas statute authorize a suit against a foreign executor or administrator but there is no room for question but that those statutes were intended to and did authorize suits against foreign executors and administrators. There is no such statute in this State and it is not contended that there is. Those three cases, therefore, have no application here.

In the case of
Lewis *v.* Reed, 11 Ind. 242,

32 a suit was brought against a non-resident of Indiana, who had been appointed administrator in that State, in his individual capacity. In the course of the opinion the court say:

"Another position is taken by counsel in the case, viz:—that Lewis should have been sued, if at all, as administrator, and not in his individual capacity. A foreign administrator is liable to be proceeded against by attachment; and perhaps the complaint in this case might well be regarded as against Lewis in that capacity."

It is evident from this that there was a statute in Indiana authorizing a suit against a foreign administrator by attachment so that if that case had involved a suit against a foreign administrator in his capacity as such it would have to be classed with the three cases just considered and held to be non-applicable here.

The case of

Brown *v.* Knapp, 79 N. Y. 140

was a suit in New York by a legatee against an executor of a Connecticut testator, who had qualified as such in that State, but who resided in New York, to whom a devise had been coupled with an obligation to pay the legacy and interest thereon, to recover the interest. It was held that the executor was individually liable for the legacy and the interest thereon and the fact that he was sued as executor could be ignored and the suit treated as against him individually. This case certainly has no applicability here.

The cases of

Lake *v.* Hardee, 57 Ga. 467
Tunstall *v.* Pollard adm'r 11 Leigh. 1
Laughlin *v.* Solomon, 180 Pa. St. 179

were all cases of suits against foreign executors who had removed to the States where the suits were instituted and brought with
33 them assets collected in the jurisdiction where appointed or were liable for assets so collected. In the Georgia case the executor was also trustee under the will and was sued as trustee, though he was treated as if sued as executor. There are other decisions to the contrary of this. As, for instance:

Peterson *v.* Chemical Bank, 32 N. Y. 21
Hedenberg *v.* Hedenberg, 46 Conn. 30

As to the wieght of authority on this proposition it is stated in Minor Conflict of Laws, 236

that;

"If an administrator, appointed in one State, removes with the assets of the estate into another State, the courts are divided upon the question whether or not the dededent's creditors may sue the administrator in the latter State without a reappointment, the wieght of authority seeming to favor the right of the creditors to sue. But if the administrator should only come into the State transiently or temporarily, the better opinion would seem to be that no action will lie against him there without a new appointment."

The ground upon which the right to sue the foreign executor in such a state of the case is based is necessity. As the foreign executor has removed to the State where suit is brought having wasted the assets collected in the foreign jurisdiction or brought them with him, if he cannot be sued there he cannot be sued at all. In the Virginia case Judge Tucker said:

"Upon a full view of the whole subject I am of the opinion that justice, convenience and necessity require a recognition of the right

to sue an executor who has qualified abroad if he comes within the jurisdiction bringing the assets with him."

The Kentucky case of

Keiningham *v.* Keiningham, 71 S. W. 497

and the other Kentucky cases cited in the opinion in that case are all cases of the same sort; and Mr. Minor cites the cases of

34 Atcheson *v.* Lindsey 6 B. M. 86

Embry *v.* Miller 1 Mar.

along with others, as justifying his statement that the weight of authority is in favor of the right to sue in such a case.

If necessity is the ground of suit in such a case the pendulum of authority might well swing to the other side if the executor sued is only transiently or temporarily within the State, as Mr. Minor states it has done: And, if such is the ground of the right to sue in such a case, authorities holding that a right to sue exists in such a case are not authorities in support of the contention here that a foreign executor or administrator may be sued in relation to assets located within the State where the suit is brought. For, in relation to such assets, no such suit is essential in order to reach them.

The only other authority cited by counsel for plaintiff from other jurisdiction than Kentucky not yet considered is the case of

Marcy *v.* Marcy's Ex'or 32 Conn. 308

That case was a suit in Connecticut against a Massachusetts executor who had collected assets in Connecticut and had removed to or lived in that State. The case of

Campbell *v.* Toursy, 7 Con.

was a suit in New York against a Pennsylvania executorr who had collected assets in New York and removed there.

The two cases were alike in their essential characteristics. It was held in both cases that the foreign executor could be sued. They differed in this, however, that in the New York case it was held that he should be sued as executor *de son tort* whereas, in the Connecticut case it was held that he might be sued as executor *de jure*. In the Connecticut case Judge Butler said;

35 "Most of the cases in which it has been held that a foreign executor could not be sued, were cases where there were no assets in the jurisdiction where the suit was brought and there was an attempt to charge him in respect to assets situate in the State or county of the domicil. Here there were assets in the State which the defendant had collected and which the plaintiff, as creditor, was entitled to have appropriated to payment of his debts, and why should he not be suable here, if at all, for that reason and holden to that extent as executor *de jure?* He was such and could not and did not deny it and not by grant of administration but by force of the will. He was suable before probate as executor *de jure* in Massachusetts as every executor is who does not renounce and his condition was substantially the same here. He is sued as executor gen-

erally in either case and why resort to legal friction and estoppel when it is entirely unneccessary? Grant that it is necessary in respect to a foreign administrator it is not so in respect to an executor." In the case of

Hopper *v.* Hopper, 125 N. Y. 400

Judge Finch, in speaking of the law as laid down in the case of Campbell *v.* Tonsey, said:—

"Before the Code and before the Revised Statutes the foreign executor who came into our jurisdiction and intermeddled with assets here could be sued as executor *de son sort*. The law regarded him not as a foreign executor but an executor here having made himself such by his own wrongful conduct."

But, as to which position is correct whether he should be sued as executor *de son tort* or executor *de jure* the ground of suability at all is the fact that he has collected the assets. If he has not collected the assets these decisions are not authorities that he is suable at all.

36 This disposes of all the cases cited by counsel for plaintiff except the Kentucky case of

Davis *v.* Connelly's Ex'or 4 B. M. 136

In that case it was simply held that a judgment rendered in Ohio against Kentucky executors in a suit in which they had voluntarily appeared and made defense was binding upon said executors and that they might be sued upon in Kentucky. There is nothing in the point there decided that has any bearing upon the question involved here.

This consideration of the authorities cited shows that none of them are applicable here or contravene the position taken in the former opinion, and, I do not think that any authorities can be found that do. The general rule as to the suability of foreign executors or administrators is thus stated in

13 A. & E. Enc. of Law 2nd edit. p. 957:

"An executor or administrator cannot be sued in his representative character unless he is made liable by statute either at law or in equity in the courts of any State or county other than that in which he has received his appointment."

It is thus stated in Minor on Conflict of Laws p. 235:

"It is the general doctrine both in England and America that no suit can be brought by or against an executor or administrator in his official capacity in the courts of any country save that from which he has derived his authority to act by virtue of the letters of probate or of administration there granted him."

Instances of statutes making him liable in the courts of another State than that in which he received his appointment are found in the cases cited by plaintiff's counsel, considered above. Those cases show also an exception to the general rule quite generally held in the case of a foreign representative who has collected assets

37 in the jurisdiction where appointed and wasted them or brought them with him to the jurisdiction—where suit is

brought and there settled—an exception recognized as a matter of "justice, convenience and necessity."

They show also an exception in the case of a foreign representative coming into the jurisdiction where suit is brought and without administering there collecting assets subject to that jurisdiction and thereby rendering himself liable to the courts of that jurisdiction. That apart from the consideration of his having collected assets there he is not liable to suit in relation to such assets nor can such assets be reached through a suit brought against him is clear. Dr. Minor, in his work on Conflict of Laws, p. 236, says;

"If a creditor of a decedent wished to sue in a foreign State to reach assets situate there, he must have letters of administration taken out there, before the suit can be instituted. He cannot in general sue a domestic administrator in a foreign court of a foreign administrator in a domestic court."

Story's Conflict of Laws (8th edit.) p. 715, thus states the law as to this.

"If a creditor wishes suit to be brought in any foreign country in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country is not suable there and has no positive right or authority over those assets, neither is he responsible therefor."

It is certain and conceded by counsel for plaintiff that a foreign representative of a decedent could not bring suit to recover such assets because of his foreign credentials. It would be strange, such being the case, that he could be sued in relation to such
38 assets or such assets be reached in a suit against him, simply because of the existence of such foreign credentials without more.

The ground upon which a foreign representative cannot sue or be sued in another jurisdiction is thus stated by Judge Finch in the case of

Hopper *v.* Hopper, *supra.*

"By the phrase 'foreign executor' the courts mean the foreign origin of the representative character. That is the sole product of the foreign law and depending upon it for existence cannot pass beyond the jurisdiction of its origin. The individual may come here and acquire rights or incur liabilities since we recognize in him no representative character. The foreign executor may make a contract here which our courts will compel him to perform because it is his contract, but, where it is the testator's only he cannot sue or be sued upon it, since the right, or the liability is purely representative and exists only by force of his official character and so cannot pass beyond the jurisdiction which gave it."

This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this

State rendering a foreign executor or administrator suable therein. Sections 3878 and 3879 Ky. Stat. provide for his suing herein upon taking certain steps. If he takes such steps he cannot only sue therein but is liable to be sued therein even by a non-resident creditor as was held in New York in the case of

Hopper *v.* Hopper, *supra.*

Sections 3898, 3899 and 3900 Ky. Stat. provide for administration upon the assets of a non-resident decedent located in this State. By either procedure creditors of a non-resident decedent subject
39 assets located in this State to the payment of their debts. This procedure is ample to secure them in their debts But whether so or not there is none other. The legislature of Kentucky has not seen fit to provide that suits may be brought against foreign executors or administrators and attachments obtained against the estates of their decedents located in this State as has been done in the States of Kansas, Ohio, Alabama, Indiana and perhaps in other States. In the absence of such a statute no such suit can be brought in this State. And I think the case of

Smith *v.* Baker, 3 Met. 264

cited in former opinion is directly in point here. The facts of the case are merely stated in the opinion. But it cites the extract from Story quoted above in support of the decision there made and the reasonable inference is that it was a suit against a foreign representative to subject assets in this State or to render him liable on account of assets therein. And whether so or not it expressly lays down the only condition upon which a foreign representative can be sued in this State and this case does not come within that requirement.

Judge Duvall said:

"An administrator or executor who is appointed, who qualifies in another State, and there receives assets into his hands may be sued in the tribunals in this State by the person or persons entitled to such assets *if he shall have removed to and settled in this State.* Such seems to be the well settled doctrine. But the right to sue a foreign administrator has never been extended further."

If then, it be conceded that the liability of the non-resident corporation doing business in this State to the decedent Atwater is an asset located in this State and that it is allowable for a creditor of decedent to sue out an attachment against his property in a
40 suit against his personal representative, the latter of which two conditions at least, I very seriously doubt, still, this suit cannot be maintained because it is a suit against a foreign executor who has never collected said asset and has never complied with sections 3878 and 3879 Kentucky Statutes so as to be authorized to sue for it and there is no statute in this State authorizing such a suit. I must, therefore, adhere to my former opinion.

A. M. J. COCHRAN, *Judge.*

And on a day following, to-wit: on April 21" A. D. 1903 final decree was entered and filed herein which was and is in words and figures following, to wit:—

Order Book "J," page 67.

This cause having been heard and submitted on the plaintiff's motion to remand this case to the State court, and on the defendant's demurrer to the jurisdiction of this court, and the motion of defendants to dismiss this case for want of jurisdiction in this court, and the court being fully advised, it is ordered that plaintiff's motion to remand this case to the State court be and it is hereby over-ruled to which plaintiff excepts.

It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this court and motion to dismiss this suit for want of jurisdiction in this court, be and the same are hereby sustained, and that this suit be and the same is hereby dismissed for want of jurisdiction in this court. And thereupon came plaintiff in open court and filed his petition for an appeal and assignment
41 of errors, and prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed upon the execution of a bond in penalty of $500.00 by plaintiff, M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, which bond shall operate as a supersedeas.

And on the same day, to-wit: on April 21" A. D. 1903, petition for appeal and assignment of errors was filed herein—which was and is in words and figures following, to-wit:—

United States Circuit Court, Sixth Circuit and Eastern District of Kentucky.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, EX'R, ET AL., Defendants. } Petition for Appeal and Assignment of Errors of M. H. Courtney.

The above named plaintiff, M. H. Courtney, conceiving himself ag-rieved by the final decree, order and judgment, this day entered in the above entitled cause, dismissing this suit for want of jurisdiction, hereby appeals therefrom and prays that this, his appeal to the Supreme Court of the United States may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, may be sent to said Supreme Court of the United States, and plaintiff states that the said final decree, order and judgment contains
42 manifest errors to his prejudice committed, and assigns the following errors, to-wit:—

I.

The court erred in over-ruling and in not sustaining plaintiff's motion to remand this cause to the State court.

II.

The court erred in sustaining and in not over-ruling defendant's demurrer to the jurisdiction of this court.

III.

The court erred in sustaining and in not over-ruling the defendant's motion to dismiss this suit for want of jurisdiction in this court.

IV.

The court erred in dismissing this suit for want of jurisdiction in this court.

Wherefore, this petitioner says that the said final decree, order and judgment aforesaid, is erroneous, and prays this honorable court to grant him an appeal to the Supreme Court of the United States to the end, that said decree may be reversed, and that said errors may be corrected, and so he will ever pray.

W. B. DIXON,
Solicitor for Plaintiff, M. H. Courtney.

And on the same day, to-wit: on April 21" A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "J," page 68.

43 This day came the complainant herein, by his counsel, and by leave of court had and obtained files his petition for appeal and assignment of errors herein and prays that this, his appeal to the Supreme Court of the United States be allowed.

The court, being fully advised herein, it is now ordered that the appeal prayed for by the complainant herein be allowed and the appeal bond is fixed at $500.00

And now comes the complainant and offers bond in the sum of $500.00 with A. M. Spottswood as surety herein, which bond is approved.

44 And on the same day, to-wit: on April 21", A. D. 1903 bond, mentioned in the foregoing entry, was filed herein which was and is in words and figures following, to-wit:—

Bond.

Know all men by these presents, that we, M. H. Courtney, as principal and A. M. Spotswood are firmly held and firmly bound unto Louis A. Pradt, executor of M. B. Atwater, deceased, and Wm. B. Atwater in the full and just sum of five hundred dollars ($500.00) to be paid to the said Louis A. Pradt, executor of M. B. Atwater, deceased, and Wm. C. Atwater, certain attorneys executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Seales with our seals and dated this 21" day of April in the year of our Lord one thousand nine hundred and three.

Whereas, lately at Covington, Kentucky, in circuit court of the United States, eastern district of Kentucky, in a suit depending in said court, between M. H. Courtney *vs.* Louis A. Pradt, executor of M. B. Atwater, deceased, and Wm. C. Atwater a decree was rendered against the said M. H. Courtney and the said M. H. Courtney having obtained appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Louis A. Pradt, executor of M. B. Atwater, deceased and Wm. C. Atwater citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, in said circuit on the — day of —— next.

45 Now, the condition of the above o*lb*igation is such, that if the said M. H. Courtney shall prosecute appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above o*lb*igation to be void; else to remain in full force and virtue.

M. H. COURTNEY. [SEAL.]
A. M. SPOTSWOOD. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—

A. M. J. COCHRAN,
U. S. District Judge.

And on a day following, to-wit: on June, 12th. A. D. 1903 citation was issued herein which was and is in words and figures following, to-wit:—

Citation.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

United States Circuit Court of Appeals for the Sixth Circuit.

To Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, Greeting:

You are hereby cited and admonished to be and appear at
46 a session of the Supreme Court of the United States to be holden at the city of Washington, on the twel-th day of July next, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, wherein M. H. Courtney, — appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twel-th day of June, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh year.

A. M. J. COCHRAN,
United States District Judge.

And on a day following to-wit: on June 15th. A. D. 1903, the citation heretofore issued herein, was returned and filed same being endorsed in words and figures following to-wit:

I accept service of the within citation for *for* appellees. This June 13th. 1903.

R. D. HILL,
Att'y for Appellees.

47 UNITED STATES OF AMERICA, *Eastern District of Kentucky,* } *ss:*

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and eastern district of Kentucky, at Covington, do hereby certify that the foregoing 46 pages contain a full, true and complete transcript of the file and proceedings had herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness, my hand as clerk, and the seal of said court, at Covington, this 15 day of June A. D. 1903. and of our Independence the 127 year.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL, *Clerk,*
By J. W. MENZIES, *D. C.*

Endorsed on cover: File No. 19,022. E. Kentucky C. C. U. S. Term No. 371. M. H. Courtney, appellant, *vs.* Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater. Filed July 27th, 1903.